

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2142

ORIGINAL

DOCKET NO. 74-2142

BPL

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of

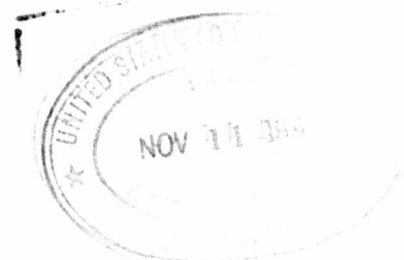
JERCYN DRESS SHOP, a Partnership,
and JACK A. SCHERER and EVA SCHERER,
as general partners, jointly.

Alleged Bankrupts.

On Appeal from the United States District Court
for the Eastern District of New York

APPELLANT'S APPENDIX

ROBERT P. HERZOG
Attorney for Appellants
185 Madison Avenue
New York, New York 10016
(212) 725-0001



3

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>	<u>Record</u>
Notice of Appeal to the United States District Court of Appeals for the Second Circuit by Petitioning Creditors and Trustee, dated August 9, 1974	1	1
Involuntary Petition in Bankruptcy	3	3
Answer dated December 6, 1972	14	9
Motion for an Order Dismissing the Involuntary Petition in Bankruptcy to the extent that it is addressed against Jack A. Scherer and Eva Scherer, individually and as General Partners of Jercyn Dress Shop	28	17
Transcript of Record	41	28
Referee's Opinion dated April 3, 1973	64	49
Order Dismissing the Involuntary Petition in Bankruptcy to the extent that it is addressed against Jack A. Scherer and Eva Scherer, individually and as General Partners in the Partnership of Jercyn Dress Shop	76	57
Petition to Review Order dated April 5, 1973	80	60
Decision and Order of Hon. Edward R. Neaher, United States District Judge, dated August 14, 1974	84	73
Relavent Docket Entries	ii	A-B

RELAVENT DOCKET ENTRIES

<u>Date</u>	<u>Proceeding</u>
11/15/72	Creditor's Petition filed by LESLIE FAY SALES, a Division of LESLIE FAY, INC., et al and proceedings referred to: Referee MANUAL J. PRICE. (Original sent to Ref. PRICE) (1)
4/6/73	Subpoena issued returnable Dec. 1, 1972. Referee's order dated April 5, 1973 filed that Jercyn Dress Shop, a partnership having filed its written consent to be adjudicated a bankrupt with this Court, dated December 6, 1972, it hereby is adjudged bankrupt, etc. (2) and that Statement of Affairs and schedules of Jercyn Dress Shop, be filed within five days from day of entry of this order.
4/26/73	Referee's Certificate on Review of order dated April 5, 1973 filed. ASSIGNED TO: NEAHER, J. (3)
4/30/73	Schedules in Bankruptcy of Jercyn Dress Shop, a Co-partnership received and filed. (4)
6/28/73	Copy of Amended Schedules B-3a & B-3b received from Referee's office and filed (5)
6/28/73	Copy of Amended Schedule A-3 received from Referee's office and filed (6)
10/18/73	By Neaher, J. - Memorandum and Order filed. Briefs are to be served as provided in Bankruptcy Rule 808, to be filed with Court no later than November 21, 1973. Petition for Review scheduled for hearing November 30, 1973, at 3:30 p. m. in Courtroom 7, etc. (7)
12/14/73	Dec. 14 - Oral review on the papers per David Brown. Memorandum of Petitioning Creditors filed. (Robert P. Herzog, Esq.) (8)
12/14/73	Joint brief submitted by Jack A. Scherer and Eva Scherer. Individual alleged bankrupts (Nathan B. Fogelson, Atty for Eva S. and Hauptman & Hauptman, Esqs. Attys. for JACK S.) (9)

<u>Date</u>	<u>Proceeding</u>
8/14/74	By Neaher, J. - Memorandum of Decision filed. Accordingly, there appearing to be no error of law in the bankruptcy judge's order granting the motion to dismiss the involuntary petition as to the individuals Jack A. Scherer and Eva Scherer. It must be, and hereby is, affirmed. So ordered. Copies mailed to Victor Bernstein, Esq., Hauptman & Hauptman, Esqs., Robert P. Herzog, Esq. (copy sent to each Bank.J.) (10)
8/20/74	Notice of Appeal filed. (Petitioning Creditors & Trustee) copy sent to Price, B. J. and U.S.C.C.A.) (11)
8/26/74	Index to Record on Appeal filed, in triplicate. Papers on Appeal A-B and original papers 1-81 sent to U.S.C.C.A.

NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT
OF APPEALS FOR THE SECOND CIRCUIT BY PETITIONING
CREDITORS AND TRUSTEE, DATED AUGUST 19, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In the Matter

72 B 1151

of

NOTICE OF APPEAL

JERCYN DRESS SHOP,
a partnership,

Bankrupt.

-----X

Notice is hereby given that the Petitioning Creditors
and Richard Hecht, trustee in bankruptcy, each hereby appeal
to the United States District Court of Appeals for the Second
Circuit, from the decision and order of Hon. Edward R. Neaher,
United States District Judge, made in the above entitled
proceedings on the 14th day of August, 1974, and from each and
every part thereof.

**NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT
OF APPEALS FOR THE SECOND CIRCUIT BY PETITIONING
CREDITORS AND TRUSTEE, DATED AUGUST 19, 1974**

The parties to this appeal are as follows:

- (A) The Petitioning Creditors of the above bankrupt represented by Robert P. Herzog, Esq., 185 Madison Avenue, New York, New York 10016.
- (B) Richard Hecht, trustee in bankruptcy of the above entitled bankrupt, represented by Robert P. Herzog, Esq., 185 Madison Avenue, New York, New York 10016.
- (C) Jack A. Scherer, represented by Hauptman & Hauptman, Esqs., 32 Court Street, Brooklyn, New York. Telephone No. (212) TR5 - 8997.
- (D) Eva Scherer, represented by Nathan B. Fogelson, Esq., 7 Dey Street, New York, New York. Telephone (212) 267 - 3030.

August 19, 1974

Robert P. Herzog, Esq.
Attorney for Petitioning
Creditors and Trustee
185 Madison Avenue
New York, New York 10016
212 725 - 0001

INVOLUNTARY PETITION IN BANKRUPTCY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In the Matter of

JERCYN DRESS SHOP, a Partnership,
and JACK A. SCHERER and EVA SCHERER,
as general partners, jointly,

In Bankruptcy No. 72B-1151

Alleged Bankrupts

-----X

INVOLUNTARY
PETITION

To: THE HONORABLE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE EASTERN DISTRICT
OF NEW YORK:

THE PETITION OF

LESLIE FAY SALES, a Division of
LESLIE FAY, INC.,
1400 Broadway
New York, New York

OF

FALCHICK DRESS CO. INC.,
1385 Broadway
New York, New York

OF

CAMPUS JUNIORS, INC.
498 Seventh Avenue
New York, New York

INVOLUNTARY PETITION IN BANKRUPTCY

RESPECTFULLY REPRESENTS:

1. To the best of your petitioners' knowledge, information and belief the above named alleged bankrupts have not conducted any business or used any assumed, trade or any other names or designations during the past six years, other than as set forth in the above caption, and have had their principal place of business at 7314 - 5th Avenue, Brooklyn, New York, and reside respectively at: c/o Lillie Margolis, 33 - 10 Avenue H, Brooklyn, New York, and at 1809 Albemarle Road, Brooklyn, New York, within the above Judicial District, for a longer portion of the six months immediately preceding the filing of the petition than in any other judicial district.
2. Said above named alleged bankrupts are neither wage-earners nor farmers, nor a municipal, railroad, insurance or banking corporation, nor a building and loan association, and owes debts to the amount of \$1,000.00 and have been engaged in the business of retail dress shop.

INVOLUNTARY PETITION IN BANKRUPTCY

3. Your petitioners are creditors of said alleged bankrupts having provable claims against them fixed as to liability and liquidated in amount, amounting in the aggregate, in excess of the value of securities held by them, to \$500.00. The nature and amount of your petitioners' claims are as follows:

The claim of your petitioner LESLIE FAY SALES, a Division of LESLIE FAY, INC., is for goods sold and delivered to the said alleged bankrupts of the agreed price and reasonable value of upwards of \$2700.00.

The claim of your petitioner, FALCHICK DRESS CO. INC., is for goods sold and delivered to the said alleged bankrupts of the agreed price and reasonable value of upwards of \$4000.00.

The claim of your petitioner, CAMPUS JUNIORS, INC., is for goods sold and delivered to the said alleged bankrupts of the agreed price and reasonable value* of upwards of \$2800.00.

* as so in original

INVOLUNTARY PETITION IN BANKRUPTCY

4. Within four months next preceding the filing of this petition, the alleged bankrupts committed an act of bankruptcy in that the alleged bankrupts did heretofore, to wit, on or about October 20, 1972, make an assignment for the benefit of creditors to Bernard Sands, which assignment was recorded in the office of the Clerk of the County of Kings, State of New York, on October 20, 1972.

5. To the best of your petitioners' knowledge, information and belief, there are more than twelve creditors of said alleged bankrupts.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, may be made upon the above named alleged bankrupts as provided in the Act of Congress relating to bankruptcy, and that they may be adjudged by the Court to be a bankrupt within the purview of said Act.

Dated: New York, New York
November 15, 1972

INVOLUNTARY PETITION IN BANKRUPTCY

LESLIE FAY SALES, a Division of
LESLIE FAY, INC.

by: s/ Richard Von Felde

FALCHICK DRESS CO. INC.

by: s/ Irving Falchick

CAMPUS JUNIORS, INC.

by: s/ Frank Peller

s/ Robert P. Herzog
ROBERT P. HERZOG and
ROBERT M. FISHER
Attorneys for Petitioners
185 Madison Avenue
New York, New York 10016
(212) 725-0001

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

RICHARD VON FELDE, being duly sworn, deposes and says:

That deponent is the Assistant Secretary of LESLIE FAY SALES, a Division of LESLIE FAY, INC. the corporate petitioner above named and makes solemn oath that he has read the foregoing petition and knows the contents thereof; that the statements contained therein are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

This verification is made by deponent because petitioner is a corporation. Deponent is an officer thereof, to wit: its Assistant Secretary.

That deponent's knowledge is derived from the books of the corporation and from persons in its employ.

INVOLUNTARY PETITION IN BANKRUPTCY

Sworn to before me this

15 day of November, 1972

s/ Paul Herzog

s/ Richard Von Felde
RICHARD VON FELDE

Paul Herzog
Notary Public, State of New York
No. 24-6876850
Qualified in Kings County
Commission Expires March 30, 1974

INVOLUNTARY PETITION IN BANKRUPTCY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

IRVING FALCHICK , being duly sworn,
deposes and says:

That deponent is the President of FALCHICK DRESS
CO. INC. the corporate petitioner above named and makes
solemn oath that he has read the foregoing petition and knows the
contents thereof, that the statements contained therein are true
to his own knowledge except as to the matters therein stated to be
alleged upon information and belief, and as to those matters he
believes them to be true.

This verification is made by deponent because petitioner
is a corporation. Deponent is an officer thereof, to wit:
its President.

That deponent's knowledge is derived from the books of
the corporation and from persons in its employ.

INVOLUNTARY PETITION IN BANKRUPTCY

Sworn to before me this

15 day of November, 1972

s/ Paul Herzog

s/ Irving Falchick
IRVING FALCHICK

Paul Herzog
Notary Public, State of New York
No. 24-6876850
Qualified in Kings County
Commission Expires March 30, 1974

INVOLUNTARY PETITION IN BANKRUPTCY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

FRANK PELLER , being duly sworn, deposes
and says:

That deponent is the President of CAMPUS JUNIORS,
INC. the corporate petitioner above named and makes solemn
oath that he has read the foregoing petition and knows the
contents thereof: that the statements contained therein are true
to his own knowledge except as to the matters therein stated to be
alleged upon information and belief, and as to those matters he
believes them to be true.

This verification is made by deponent because
petitioner is a corporation. Deponent is an officer thereof,
to wit: its President.

That deponent's knowledge is derived from the books
of the corporation and from persons in its employ.

INVOLUNTARY PETITION IN BANKRUPTCY

Sworn to before me this

15 day of November, 1972

s/ Paul Herzog

s/ Frank Peller
FRANK PELLER

Paul Herzog
Notary Public, State of New York
No. 24-6876850
Qualified in Kings County
Commission Expires March 30, 1974

ANSWER DATED DECEMBER 6, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In the Matter

of

No. 72-B-1151

JERCYN DRESS SHOP, a Partnership,
and JACK A. SCHERER and EVA SCHERER,
as general partners, jointly,

ANSWER OF JACK
A. SCHERER AND
EVA SCHERER,
INDIVIDUAL ALLEGED
BANKRUPTS

Alleged Bankrupts.
-----X

The above-named individual alleged bankrupts, namely,
JACK A. SCHERER, a partner, appearing by HAUPTMAN &
HAUPTMAN, ESQS., his attorneys, and EVA SCHERER, a
partner, appearing by NATHAN B. FOGELSON, her attorney,
answering the involuntary petition in bankruptcy herein,
respectfully allege:

1. Deny knowledge or information sufficient to form
a belief as to the allegations contained in Pars. "3." and "5."
of the involuntary petition.

ANSWER DATED DECEMBER 6, 1972

2. Deny each and every allegation contained in Par. "4." of the petition.

AS AND FOR A FIRST AFFIRMATIVE
DEFENSE:

3. The act of bankruptcy alleged in the involuntary petition is that JERCYN DRESS SHOP, the partnership, made an assignment for the benefit of creditors on October 20, 1972 to BERNARD SANDS.

4. As appears from said assignment for the benefit of creditors, said assignment was the assignment of only JERCYN DRESS SHOP, one of the above-named alleged bankrupts and was not an assignment made by the individual partners, the above-named JACK A. SCHERER and EVA SCHERER.

5. Hence, no act of bankruptcy, as defined in Sec. 3(a) of the Bankruptcy Act has been set forth in the petition as against the individual alleged bankrupts JACK A. SCHERER and EVA SCHERER.

ANSWER DATED DECEMBER 6, 1972

AS AND FOR A SECOND AFFIRMATIVE
DEFENSE:

6. A. The assignment for the benefit of creditors which the alleged bankrupt JERCYN DRESS SHOP, the partnership, made ran to BERNARD SANDS of 505 Eighth Avenue, New York, N. Y., as the Assignee.
- B. Said Assignee was selected by the partnership's creditor body to act for the partnership's creditors and to accept the assignment in behalf of the partnership's creditor body.
- C. Said partnership Assignee accepted such assignment, has acted, and is now acting thereunder in behalf of the partnership creditors.
- D. By virtue thereof, the moving creditors, and creditors generally, are estopped from utilizing said assignment for the benefit of creditors, in which they acquiesced, as a basis for their filing an involuntary petition against the individual partners.

ANSWER DATED DECEMBER 6, 1972

WHEREFORE, the alleged bankrupts, JACK A. SCHERER and EVA SCHERER, the individual partners, respectfully move that the involuntary petition filed against them be dismissed with costs.

Dated: December 6, 1972.

s/ Saul Hauptman

HAUPTMAN & HAUPTMAN
Attorneys for Jack A. Scherer,
Alleged Bankrupt
32 Court Street
Brooklyn, New York 11201
TR5 - 8997

s/ Nathan B. Fogelson

NATHAN B. FOGELSON
Attorney for Eva Scherer,
Alleged Bankrupt
7 Dey Street
New York, New York
267-3030

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

THIS INDENTURE,

Made the 19 day of October, in the year one thousand nine hundred and seventy-two BETWEEN JERCYN DRESS SHOP, a co-partnership comprised of JACK A. SCHERER and EVA SCHERER, having its principal place of business at 7314 Fifth Avenue, Brooklyn, N. Y. , party of the first part and BERNARD SANDS, 505 Eighth Avenue, New York, N. Y., party of the second part

WITNESSETH:

WHEREAS the party of the first part has carried on and now is engaged in the business of ladies apparel at retail at No. 7314 Fifth Avenue, New York, N. Y.,

WHEREAS the party of the first part is indebted to divers persons in sundry sums of money, which it is unable to pay in full, and it is desirous of providing for the payment of the same, so far as it is possible by a general assignment of all its property for that purpose:

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

NOW THEREFORE, the party of the first part, in consideration of the premises and of the sum of one dollar paid by the party of the second part, upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over, unto the party of the second part his successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, claims, demands, property and effects of every description belonging to the party of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under an execution.

TO HAVE AND TO HOLD the same, and every part thereof, unto the said party of the second part, his successors and assigns.

IN TRUST, NEVERTHELESS, to take possession of

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

the same, and to sell the same with all reasonable dispatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and out of all the proceeds of such sales and collections, to pay and discharge all the just and reasonable expenses, costs and disbursements in connection with the execution of this assignment and the discharge of the trust hereby created, together with the lawful commissions or allowances of the party of the second part for his services in executing said trust; THEN to pay and discharge such claims as are entitled to preference in payment under the laws of the State of New York, including wage claims earned within 3 months prior to the execution of this Indenture, but not exceeding \$1,000.00 for each unpaid employee; if the net distributable assets be insufficient to pay such priorities in full, such assets shall be applied pro rata in payment thereof.

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

AND then to pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the said party of the first part, with all interest moneys due or to grow due thereon; and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest thereon in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

AND if, after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, its executors, administrators or assigns.

AND, in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part its true and lawful attorney, irrevocable, with full power and authority to do all acts and things

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts and demands due, owing and belonging to the said party of the first part, and to give acquittances and discharges for the same; to sue, prosecute, defend and implead for the same; and to execute, acknowledge, and deliver all necessary deeds, instruments and conveyances: and for any of the purposes aforesaid to make, constitute and appoint one or more attorneys under him and at his pleasure to revoke the said appointments, hereby ratifying and confirming whatever the said party of the second part or his substitutes shall lawfully do in the premises.

AND the said party of the first part hereby authorizes the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said party of the first part, or to sign the name of the party of

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

the first part to any instrument in writing, whenever it shall be necessary so to do, to carry into effect the object, design and purpose of this trust.

THE said party of the second part does hereby accept the trust created and reposed in by this instrument, and covenant and agree to and with the said part of the first part that he will faithfully and without delay execute the said trust, according to the best of his skill, knowledge and ability.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

JERCYN DRESS SHOP

 Eva Scherer-Co-partner

By:.....
 Co-Partner Assignor Jack A. Scherer

.....
 Bernard Sands Assignee

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

On the 20 day of October, nineteen hundred and seventy-two before me came BERNARD SANDS to me known and known to me to be the individual described in, and who executed, the foregoing instrument, and acknowledged to me that he executed the same.

HERMAN COHEN
 Notary Public, State of New York
 No. 24-5739400 Qual. in King Co.
 Term Expires March 30, 1974

STATE OF NEW YORK)
) ss.:
 COUNTY OF

On the day of , nineteen hundred and before me
 came to me known, who, being by me duly sworn, did depose and
 say that he resides in that he is the of the corporation
 described in, and which executed, the foregoing instrument; that he
 knows the seal of said corporation; that the seal affixed to said instru-
 ment is such corporate seal; that it was so affixed by order of the
 board of of said corporation; and that he signed h name
 thereto by like order.

EXHIBIT ANNEXED TO
ANSWER DATED DECEMBER 6, 1972

STATE OF NEW YORK)
 : SS.:
 COUNTY OF KINGS)

On the 19 day of October, nineteen hundred and seventy-
 two before me came JACK A. SCHERER, to me known and known to
 me to be the individual described in, and who executed, the fore-
 going instrument, and acknowledged to me that he executed the same.

SALOMAN A. HAUPTMAN
 NOTARY PUBLIC, STATE of NEW YORK
 No. 24-68006600 Qual. in Kings County
 Cert. Filed in Kings Co. Clk's & Reg Off.
 COMMISSION EXPIRES MARCH 30, 1974

STATE OF NEW YORK)
 : SS.:
 COUNTY OF NEW YORK)

On the 19 day of October, 1972, before me came EVA
 SCHERER to me known and known to me to be the individual
 described in, and who executed, the foregoing instrument, and
 acknowledged to me that she executed the same.

Nathan B. Fogelson
 Notary Public, State of New York
 No. 31-1262100
 Qualified in New York County
 Commission Expires March 30, 1973

ANSWER DATED DECEMBER 6, 1972

STATE OF NEW YORK)
) SS. :
COUNTY OF KINGS)

JACK A. SCHERER, being duly sworn, deposes and says that deponent is one of the alleged bankrupts in the within proceeding; that deponent has read the foregoing Answer and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Jack A. Scherer

Sworn to before me this

8 day of December, 1972

Salomon A. Hauptman
NOTARY PUBLIC, STATE of NEW YORK
No. 24-6806600 Qual. in Kings County
Cert. filed in Kings Co. Clk's & Reg. Off.
COMMISSION EXPIRES MARCH 30, 1974

ANSWER DATED DECEMBER 6, 1972

STATE OF NEW YORK)
) SS.:
 COUNTY OF KINGS)

EVA SCHERER, being duly sworn, deposes and says that deponent is one of the alleged bankrupts in the within proceeding; that deponent has read the foregoing Answer and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

s/ Eva Scherer
 Eva Scherer

Sworn to before me this

7th day of December, 1972

s/ Nathan B. Fogelson

NATHAN B. FOGELSON
 Notary Public, State of New York
 No. 31-1262100
 Qualified in New York County
 Commission Expires March 30, 1973

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In the Matter

No. 72-B-1151

-of-

JERCYN DRESS SHOP, a Partnership,
and JACK A SCHERER and EVA
SCHERER, as general partners,
jointly,

PETITION AND NOTICE
OF MOTION OF ALLEGED
BANKRUPTS JACK A.
SCHERER AND EVA
SCHERER TO DISMISS
INVOLUNTARY PETITION

Alleged Bankrupts.

-----X

SIRS :

PLEASE TAKE NOTICE, that upon the annexed joint
petition of JACK A. SCHERER, appearing by his attorneys,
HAUPTMAN & HAUPTMAN, ESQS., and EVA SCHERER,
appearing by NATHAN B. FOGELSON, her attorney, and upon
the annexed assignment for the benefit of creditors executed by
JERCYN DRESS SHOP under the New York Debtor and Creditor

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

Law, running to BERNARD SANDS, as assignee for the benefit of the partnership's creditors, dated October 19, 1972, and filed in the Kings County Clerk's Office on October 20, 1972, and upon the involuntary petition herein, dated November 15, 1972, the undersigned will move this Court before HON. MANUEL J. PRICE, Referee in Bankruptcy, Room 343, U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on December 19, 1972, at 10:30 A.M., for an order dismissing the involuntary petition in bankruptcy to the extent that it is addressed against said JACK A. SCHERER and EVA SCHERER, individually and as general partners in the above-mentioned partnership of JERCYN DRESS SHOP for the following reasons:

A. The involuntary petition in bankruptcy, dated November 15, 1972, alleges, as an act of bankruptcy on which the involuntary petition is based, that the alleged bankrupts executed the above-mentioned assignment for the benefit of

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

creditors in behalf of JERCYN DRESS SHOP, one of the alleged bankrupts, which is the only entity which executed and filed the assignment for the benefit of creditors.

B. No act of bankruptcy, as contemplated by Sec. 3(a) of the Bankruptcy Act, is alleged in said petition to have been committed by the individual alleged bankrupts, JACK A. SCHERER and EVA SCHERER, in their individual capacity.

C. The assignment for the benefit of the creditors of the alleged partnership bankrupt, JERCYN DRESS SHOP was executed by "JERCYN DRESS SHOP, a co-partnership comprised of JACK A SCHERER and EVA SCHERER"; its purpose, scope, intent and legal effect was to assign the assets of the partnership only and not the individual assets of the individual partners; hence, no act of bankruptcy, as contemplated by Sec. 3(a) of the Bankruptcy Act, has been alleged to have been

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

committed by the individual bankrupts so as to constitute an act of bankruptcy on their individual part.

D. The partnership assignment for the benefit of creditors ran to the creditors'-designated assignee, BERNARD SANDS, selected by the partnership's creditor body to act for the partnership's creditors and to accept the assignment in behalf of the partnership's creditor body; said BERNARD SANDS, the assignee designated by the partnership's creditors, has accepted such assignment, has acted and is now acting thereunder in behalf of the partnership creditors; by virtue thereof, the petitioning creditors, and creditors generally, are estopped from utilizing the partnership assignment for the benefit of creditors, in which they acquiesced, as a basis for their filing an involuntary petition against the individual partners.

At the hearing before the Referee the undersigned will

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

ask for such other and further relief as may be proper.

PLEASE TAKE FURTHER NOTICE, that demand is
hereby made upon you, pursuant to Rule 6(d) of the Federal
Rules of Civil Procedure, that no later than one (1) day prior to
the return day of this motion that you serve upon the undersigned
copies of your answering papers.

Dated: December 5, 1972.

Yours, etc.

HAUPTMAN & HAUPTMAN
Attorneys for Jack A. Scherer,
Alleged Bankrupt
32 Court Street
Brooklyn, New York 11201
TR 5-8997

NATHAN B. FOGELSON
Attorney for Eva Scherer,
Alleged Bankrupt
7 Dey Street
New York, New York
267-3030

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

TO:

ROBERT P. HERZOG and
ROBERT M. FISHER, ESQS.
Attorneys for Petitioning Creditors
185 Madison Avenue
New York, New York 10016

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In the Matter

-of-

JERCYN DRESS SHOP, a Partnership,
and JACK A. SCHERER and EVA
SCHERER, as general partners,
jointly,

PETITION

Alleged Bankrupt.

-----X

TO THE HON. JOSEPH V. COSTA,
REFEREE IN BANKRUPTCY:

The joint petition of JACK A. SCHERER, appearing
by his attorneys, HAUPTMAN & HAUPTMAN, ESQS., and
EVA SCHERER, appearing by NATHAN B. FOGELSON, ESQ.,
her attorney, respectfully allege:

1. We are the individual partners who comprise the
partnership of JERCYN DRESS SHOP, the above-named alleged

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

bankrupt.

2. We are submitting this petition in support of our motion to dismiss the involuntary petition filed herein both against the partnership, JERCYN DRESS SHOP, and against us individually, insofar as said involuntary petition is addressed against us "as general partners, jointly".

3. The only act of bankruptcy alleged against us is that which is set forth in Par. 4 of the involuntary petition, which reads as follows:

"4. Within four months next preceding the filing of this petition, the alleged bankrupts committed an act of bankruptcy in that the alleged bankrupts did heretofore, to wit, on or about October 20, 1972, make an assignment for the benefit of creditors to Bernard Sands, which assignment was recorded in the office of the Clerk of the County of Kings, State of New York, on October 20, 1972."

4. A true copy of the partnership's assignment for the benefit of creditors is annexed hereto and made part hereof.

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

5. From said assignment for the benefit of creditors, it readily appears that the assignor therein stated is "JERCYN DRESS SHOP, a co-partnership, comprised of JACK A. SCHERER and EVA SCHERER".

6. Said assignment for the benefit of creditors on its face declares that it is an assignment executed by the partnership, assigning the partnership's assets to an assignee for the benefit of the partnership's creditors.

7. Section 3(a) of the Bankruptcy Act, insofar as relevant here, defines an act of bankruptcy to exist when:

"(4) made a general assignment for the benefit of creditors."

8. We submit that it appears from the annexed exhibit, namely, the partnership assignment for the benefit of creditors, only the partnership made a general assignment for the benefit of creditors.

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

9. Section 5 of the Bankruptcy Act dealing with partners, does not, by its wording or interpretation, provide that an act of bankruptcy committed by the partnership qua partnership, shall constitute an act of bankruptcy committed by the individual partners.

10. A. Moreover, the above-mentioned partnership assignment for the benefit of creditors designates BERNARD SANDS, 505 Eighth Avenue, New York, N. Y., as the assignee.

B. Said assignee was selected by the partnership's creditor body to act for the partnership's creditors and to accept the assignment in behalf of the partnership's creditor body.

C. Said partnership assignee accepted such assignment, has acted and is now acting thereunder in behalf of the partnership creditors.

D. By virtue thereof, the moving creditors, and

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

creditors generally, are estopped from utilizing the assignment
for the benefit of creditors, in which they acquiesced, as a basis
for their filing an involuntary petition against the individual
partners.

WHEREFORE, petitioner, JACK A. SCHERER and
EVA SCHERER, the individual partners, respectfully move that
the involuntary petition filed against them be dismissed.

Dated : December 5, 1972.

HAUPTMAN & HAUPTMAN
Attorneys for Jack A. Scherer,
Alleged Bankrupt
32 Court Street
Brooklyn, New York 11201
TR 5-8997

MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

NATHAN B. FOGELSON,
Attorney for Eva Scherer,
Alleged Bankrupt
7 Dey Street
New York, New York
267-3030

EXHIBIT ANNEXED TO THE
MOTION FOR AN ORDER DISMISSING THE INVOLUNTARY
PETITION IN BANKRUPTCY TO THE EXTENT THAT IT IS
ADDRESSED AGAINST JACK A. SCHERER AND EVA SCHERER,
INDIVIDUALLY AND AS GENERAL PARTNERS OF
JERCYN DRESS SHOP

SEE: EXHIBIT ANNEXED TO ANSWER DATED
DECEMBER 6, 1972

pages 18-25

TRANSCRIPT OF RECORD

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----X

In the Matter :

of :

JERCYN DRESS SHOP, a partnership, :
and JACK A. SCHERER and EVA :
SCHERER, as general partners :
jointly :

72 B 1151

Debtor :

-----X

United States Courthouse
Brooklyn, N. Y.

January 30, 1973
10:30 a. m.

B e f o r e

HON. MANUEL J. PRICE

Referee in Bankruptcy

MOTION

RONALD E. TOLKIN
Official Court Reporter

TRANSCRIPT OF RECORD

Appearances:

MESSRS. HAUPTMAN & HAUPTMAN
Attorneys for Movant Jack Scherer
32 Court Street
Brooklyn, N. Y.

BY: S. A. HAUPTMAN, ESQ.,
of counsel

ROBERT P. HERZOG, ESQ.
Attorney for Petitioning Creditors
2 Park Avenue
New York, N. Y.

NATHAN FOGELSON, ESQ.
Attorney for Eva Scherer
7 Dey Street
New York, N. Y.

THE REFEREE: Jercyn Dress Shop.

MR. HERZOG: Your Honor, Mr. Hauptman stepped out for a moment with Judge Costa. We'll get him, but his absence won't be prejudicial at the moment because his position is the same as Mr. Fogelson's position.

This relates to a motion --

TRANSCRIPT OF RECORD

MR. FOGELSON: I think he ought to be present, your Honor. We drew the motion. Referee Costa called him out.

MR. HERZOG: Maybe we'd better --

THE REFEREE: Is your position --
Both of you represent the same side?

MR. FOGELSON: Yes. He represents the husband and I represent the wife.

THE REFEREE: Are they living together?

MR. FOGELSON: No, your Honor, they're seperated. The business went under and the marriage went under together, with it, so they're separated.

MR. HERZOG: Your Honor, I believe that this motion that was brought is really a question of law that is raised.

THE REFEREE: I suggest that since the parties are separate, that we wait for Mr. Hauptman.

(Pause)

MR. HERZOG: As I was saying, your Honor, I

TRANSCRIPT OF RECORD

believe that essentially a question of law is raised by the motion. The thrust of Mr. Hauptman's motion is that there was no act of bankruptcy as contemplated by the Bankruptcy Act. What happened here I think is undisputed, the facts. Two partners, a husband and wife, made and signed a deed of general assignment of the partnership. That deed is annexed as an exhibit to his motion papers, and while it is not, you know, signed by both parties, the original as filed in the County Clerk's office is, and I think that is undisputed.

MR. HAUPTMAN: No question in my mind.

MR. HERZOG: He says, essentially, in his motion papers that this was an act of bankruptcy on behalf of the partnership entity, which is separate and apart from the individuals, and then reasons that since there was no individual act of bankruptcy the petition is jurisdictionally defective or can be thrown out or dismissed.

The petition was drafted jointly against the partners

TRANSCRIPT OF RECORD

pursuant to the provisions of Section 5 of the Bankruptcy Act which, in legislative language permits the filing of a petition jointly against a partnership or any of its partners.

THE REFEREE: Well, they consented to adjudication on behalf of the partnership.

MR. HERZOG: I'd like to hand up, and I have previously cited to my eminent colleagues, both Mr. Fogelson and Mr. Hauptman, the Matter of Chemical National Bank versus Meyer, a Southern District case --

THE REFEREE: Pardon me, and Eastern District.

MR. HERZOG: -- an Eastern District case, decided March 27, 1899, and affirmed by the Second Circuit in 1899 also.

The decision indicates that the act by a partner in signing a deed of assignment constitutes an individual act of bankruptcy on behalf of that particular partner as well as an act of bankruptcy on the partnership, and in this case, since both partners signed it, the act was, I maintain, an individual act of

TRANSCRIPT OF RECORD

bankruptcy on behalf of each of the parties.

THE REFEREE: Doesn't Section 5 specifically provide --
I think it's 5a -- doesn't it specifically provide for an act of
bankruptcy by the partnership as distinguished from that of a partner?
I'm reading now from Section 5a of the Act: "A partnership,
including a limited partnership containing one or more general
partners, during the continuation of the partnership business or
after its dissolution and before the final settlement thereof, may
be adjudged a bankrupt either separately or jointly with one or
more of its general partners."

So isn't there a distinction between the partners individually
and the entity of a partnership?

MR. HERZOG: No, I think, your Honor, the language of
the Act is clear that when Congress enacted this provision the act
of bankruptcy of the partnership constitutes an individual act as well.

But even if it doesn't, the law is clear that such is the
case, because the partnership is a peculiar entity. Its solvency is

TRANSCRIPT OF RECORD

determined by taking all the partnership assets as well as the sum of the individual partners' assets to determine solvency.

In other words, to file a petition -- let us assume an involuntary petition against the partnership and a defense of solvency is raised -- it is not the case here, but to understand it better -- a court would have to look at the total sum of the assets of the partnership, and if that were insufficient as an entity to satisfy solvency, it would then look to each of the partners.

THE REFEREE: But this isn't the defense. The defense here is that there was no act of bankruptcy.

MR. HERZOG: Well, I am getting to that point. The act of bankruptcy is the making of the assignment. When these parties made the assignment, they affected their own personal assets by so doing because as partners they were jointly and severally liable to their creditors or to the creditors of the partnership, and should there be insufficient assets -- and it is admitted that the partnership is insolvent and is to be adjudicated,

TRANSCRIPT OF RECORD

has not been a bankrupt -- then they also to the extent they had an interest in that partnership made a general assignment of their assets, to wit, their partnership assets.

THE REFEREE: Let me ask you this, Mr. Herzog: How are you prejudiced by the making -- by the adjudication in bankruptcy only of the partnership, because you still would have a viable claim for the deficiency against the individual partners?

In other words, the assets of the partnership are marshaled; they are then distributed to creditors. If there is a deficit, creditors of the partnership have debts which have not been discharged against the individual partners and may then proceed against them.

MR. HERZOG: No, because then under Section 5d, your Honor, I would then have to make an order against the individual, because under 5d the Bankruptcy Court has jurisdiction of the general partners and of the administration of partnership and individual property, and therefore I would have to proceed,

TRANSCRIPT OF RECORD

assuming this was a separated case, with an adjudication of the partnership and the election of a trustee. The trustee would, if he was properly administering the partnership estate, would then proceed against each of the partners for a turnover of their individual property so as to satisfy any deficiencies that maybe occurred in the bankruptcy, and of course, if they were bankrupt it would at that time -- the order directing turnover would compel them to file separate petitions.

THE REFEREE: That's right.

MR. HERZOG: Yes, but then preferential transfers would date from different times, whereas this petition was filed and has now become the cutoff date for any transfer that may have been preferential or fraudulent, whereas four or five months from now -- a year might expire -- and a fraudulent transfer would be without the statute, or preferential transfers would be without the four-months period; so the trustee and its creditors would indeed be seriously prejudiced as against these individuals.

TRANSCRIPT OF RECORD

THE REFEREE: Let me hear Mr. Hauptman.

MR. HAUPTMAN: If the Court please, I think your Honor directly went to the heart of the alleged bankrupt's position on this motion.

The reasoning behind this Section 3 of the Bankruptcy Act certifying as an act of bankruptcy the execution of an assignment for the benefit of creditors is that by the very result of that assignment assets have been removed from the claim or reach of the creditors and put into the hands of an assignee against whom alone creditors may now assert their claims.

That point, that rationale behind Specification No. 4, the fourth act of bankruptcy, was recently discussed in the Court of Appeals, Second Circuit, in the brokerage bankruptcy case of Blair & Company, decided about a month ago by the Court of Appeals.

There, under the Stock Investment protection Act, recently passed by Congress, we have a setup where stock brokerage houses which get into difficulty are governed firstly by

TRANSCRIPT OF RECORD

the Stock Exchange SIPC, Stock Investment Protective Committee or Council, et cetera, and Blair & Co. invoked the Stock Exchange Compact entered into by all members of the association, and they turned over their assets to a liquidator, a voluntarily chosen liquidator.

THE REFEREE: I'm familiar with the case.

MR. HAUPTMAN: Whereupon a creditor filed an involuntary petition in bankruptcy saying that, having utilized that SIPC, that was equivalent to an assignment for the benefit of creditors, and Judge Herzog bought that and adjudicated them.

THE REFEREE: It was then affirmed.

MR. HAUPTMAN: Then it was affirmed by Judge Edelson.

Then they took -- Leo Raines, the attorney for Blair & Co. and he reversed Judge Herzog on the following theory --

MR. HERZOG: It was the other way around.

MR. HAUPTMAN: The other way around, all right.

TRANSCRIPT OF RECORD

I am reading from the opinion of the Court of Appeals on the nature and the reasoning why an assignment for the benefit of creditors is an act of bankruptcy.

"To look at the matter somewhat more broadly, receivership and trusteeship both entail the consequence, as does the fourth act of bankruptcy, 'a general assignment for the benefit of creditors,' that creditors cannot pursue their ordinary remedies against the debtor and his property, but are relegated to proceeding in one way or another with respect to the assets of the receiver or the trustee."

THE REFEREE: The Blair case held that since the liquidator was not a court-appointed receiver or trustee that that act was not encompassed --

MR. HAUPTMAN: It didn't fall within the fourth act.

THE REFEREE: -- within the bankruptcy act.

MR. HAUPTMAN: The reason I quoted this section was the reasoning behind that is that by assigning your assets for the

TRANSCRIPT OF RECORD

benefit of creditors you will deprive, delay or hinder creditors from reaching your assets; they've got to go after the assignee either in the state court or elsewhere.

Now, in our case here the individual partners have not assigned for the benefit of the creditors any of their assets. No one here on the record before today knows whether the alleged bankrupt has a million dollars or has no dollars.

Under the entire theory of partnership liability for debts contracted by the partnership we first go after the partnership assets and if there is a disparity of assets to pay in full we go after the individual assets of the individual partners.

THE REFEREE: I don't agree with you. I think the creditors can now -- if your position is a valid one, I think creditors without waiting for the liquidation --

MR. HAUPTMAN: They may sue the individual.

THE REFEREE: -- may proceed because the individual partners are liable jointly and severally.

TRANSCRIPT OF RECORD

MR. HAUPTMAN: Correct. Now, that is the essence of our position, Mr. Fogelson's and mine. No creditor is estopped today from suing either Mr. Scherer or Mrs. Scherer on a partnership debt contracted during the lifetime and the activity of the partnership.

Now, that being so, and there being no records of the insolvency -- nothing in the record here that the alleged bankrupts are insolvent, why should the alleged bankrupts be forced into bankruptcy by virtue of having signed an assignment for the benefit of creditors which clearly says, "This is an assignment indenture between Jercyn Dress Shop, a co-partnership comprised of Jack A. Scherer and Eva Scherer"? There isn't a word in the assignment indenture that the individual partners have assigned their assets to the assignee. Whatever their personal assets are, they are, and creditors are free to sue them. As a matter of fact, Mr. Herzog's client and other creditors of the partnership have sued the individual alleged bankrupts here, the

TRANSCRIPT OF RECORD

individual partners, and the actions are either pending or they are in default, so that creditors were well advised, apparently, that the adjudication in bankruptcy of the partnership does not stop them from suing individual partners and trying to reach their individual assets.

So to sum up our position, an involuntary petitioning creditor must come within the ambit of Section 3 of the Bankruptcy Act, and he must spell out a particular act of bankruptcy. I submit that the involuntary petition filed here this composite against both the partnership and the individuals alleges an act of bankruptcy under the fourth act only against the partnership, it does not allege or establish or prove that the individual alleged bankrupts committed an act of bankruptcy. That's our position on that.

Now with respect to the case Mr. Herzog referred to, this Chase Manhattan against Meyer, it arose, oddly enough, in this very district in 1899, and there the issue was not what

TRANSCRIPT OF RECORD

Mr. Herzog is arguing that it is; the issue there was, Is a partnership a person within the contemplation of the Bankruptcy Act, that it can be adjudicated a bankrupt ? Remember, this case goes back 74 years in time, to 1899.

At that time the language of the statute and the decided cases had not yet officially and formally passed upon whether a partnership is a person that could be adjudicated a bankrupt, and this case, which is upheld by the Court of Appeals, said yes, a partnership is a person and it may be the subject of a voluntary or an involuntary petition.

At the very tail end of the lower court's opinion there's one reference to the fact that the individual partner -- in that case, one of the two partners had died. There was a surviving partner, and the question was, this surviving partner having signed the assignment for the benefit of creditors, was that an act of bankruptcy to force him into bankruptcy.

Judge Thomas wrote the opinion for this court then, and

TRANSCRIPT OF RECORD

in this one paragraph of the opinion, which was tangential and peripheral to the whole discussion, said, "I believe that it would, and it is an act of bankruptcy."

THE REFEREE: Your position is it's dicta.

MR. HAUPTMAN: That it's dicta. That -- if I may use the expression of your colleague in the Southern District, Referee Ryan -- there's no reason to perpetuate an error because it occurred 73 years ago.

In the Court of Appeals there is no word in the entire opinion --

Do you have the Court of Appeals with you?

MR. HERZOG: No, but it's identical --

MR. HAUPTMAN: All right. But there is not a word in the entire opinion that is addressed to the question that we're discussing today, namely, the fact that one or both partners to a partnership signed the partnership assignment, that that binds them that it shackles them to an individual acknowledgment that

TRANSCRIPT OF RECORD

they have committed an act of bankruptcy.

So we say that these two cases, if your Honor will look at when you have time, I am sure, do not say what my adversary contends, and so far as we know -- and I found no law yet, but I have not completed my research -- no opinion yet that I have come across that passed squarely on this question.

And I'll finish by posing the question succinctly: where two partners comprising a partnership signed qua partners an assignment for the benefit of creditors, and there is no allegation or proof that the individual partners are insolvent, does that fact, the mere naked fact that the individual partners acting for the partnership executed a partnership assignment, is that a personal act under the fourth act of Section 3?

Mr. Fogelson and I say it does not.

MR. HERZOG: Your Honor, I have handed up a photocopy of the case, the Meyer case. Right on the first page, about where your thumb is, your Honor, in the middle there, you will

TRANSCRIPT OF RECORD

see a number at the bottom of the first paragraph where the Court in its introduction states very succinctly "(1) Was such an assignment of firm property by Meyer an act of bankruptcy by him individually?" And then the Court went on to discuss it for the next four pages. I don't see how Mr. Hauptman can assert that this is dicta to the case when the Court puts it out as the primary object of its opinion and then concludes with a result that I believe is the law today and was affirmed by the Circuit Court of Appeals and is unchanged.

With regard to the Blair case it refers to, that certainly is the dicta of the case.

The case in Blair is the question on jurisdiction, and the case turns on jurisdiction. There is no assertion of a lack of jurisdiction here. The question is whether an act of bankruptcy has been committed by the individuals against whom this joint petition has been filed.

Now, one of the defenses Mr. Hauptman and

TRANSCRIPT OF RECORD

Mr. Fogelson, I presume, raise is one of estoppel, I presume under Section 57H of the Bankruptcy Act.

MR. HAUPTMAN: We're not alleging --

THE REFEREE: I think the Boley & Travis case passed on that a long time ago, on the question of the acquiescence by creditors.

MR. HAUPTMAN: I was a party to the Boley & Travis case.

MR. HERZOG: I think, your Honor, that that's the case. I think it's a matter of law, and I think this decision is good, and Mr. Hauptman disputes it.

MR. HAUPTMAN: May we have a reasonable time to submit a brief on this, Judge?

THE REFEREE: Yes, I'll give you time. I'll give Mr. Herzog an opportunity to submit a memorandum.

MR. HERZOG: To reply to his movant's brief.

THE REFEREE: Well, I suggest you exchange memoranda.

TRANSCRIPT OF RECORD

MR. HAUPTMAN: We'll take care of it.

THE REFEREE: How much time do you want?

MR. HAUPTMAN: Two weeks?

MR. HERZOG: Your Honor, if we exchange them, sometimes you then have to reply to points they --

THE REFEREE: I'll give you an opportunity to reply.

MR. HAUPTMAN: There is no prejudice by giving us more time. Nothing is happening.

MR. HERZOG: No, I am not asserting that. I just thought it might be more logical for me to reply to Mr. Hauptman's brief, and it would require further briefing, except for him, if he needs time on the points I have raise.

MR. HAUPTMAN: Fine. All briefs in by when? Three weeks?

MR. HERZOG: Well, I'd like to receive your brief first so that I could reply to it, and if you want to answer it you can have such additional time --

TRANSCRIPT OF RECORD

THE REFEREE: I will give you until the 13th. Mr. Hauptman is to serve his memorandum by the 13th.

MR. HERZOG: And ten days for me, then, your Honor, the 23rd, or so?

THE REFEREE: Petitioning creditors have until February 23rd to reply.

All papers served and filed by the 26th.

MR. HAUPTMAN: Judge, one other point not relating directly to the motion: I prepared and I'd like to file the schedules so that your Honor can call a meeting. Miss Shea tells me that there has been no order of adjudication on our consent for the partnership's bankruptcy.

Might I file it nevertheless, so whenever you're ready you could send out your notices, or do you want to wait for the order?

THE REFEREE: Why don't you wait until the order comes through?

TRANSCRIPT OF RECORD

MR. HERZOG: I was going to say I don't believe there is any prejudice in delaying this because the assignment, of course, liquidated the assets so far as we know, and I don't believe --

THE REFEREE: The assignee for the benefit of creditors has them?

MR. HERZOG: Yes, and he's bonded, and I don't believe there's any --

THE REFEREE: How much did the sale bring?

MR. HAUPTMAN: About \$4,000; not more than \$4,000.

THE REFEREE: Oh, and he's holding the funds?

MR. HAUPTMAN: Yes.

THE REFEREE: All right.

MR. HAUPTMAN: Thank you very much, Judge.

MR. HERZOG: Thank you, your Honor.

REFEREE'S OPINION DATED APRIL 3, 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

In the matter of	:
JERCYN DRESS SHOP, a partnership and	: No. 72-B-1151
Jack A. Scherer and Eva Scherer, as	:
general partners, jointly,	:
Alleged Bankrupt.	:

Appearances:

Hauptman & Hauptman, Esqs.,
Attorneys for Alleged Bankrupt,

BY: S. A. Hauptman, Esq.

Robert P. Herzog, Esq.,
Attorney for Petitioning Creditor,
185 Madison Avenue,
New York, New York

This is a motion, made by Jack A. Scherer and Eva Scherer, herinafter the Scherers, to dismiss the involuntary petition in bankruptcy filed against them on November 15, 1972

REFEREE'S OPINION DATED APRIL 3, 1973

on the ground that they did not commit an act of bankruptcy as required by Section 3(a) of the Bankruptcy Act, 11 U.S.C. Section 21(a).

A short resume of the facts follows:

The Scherers are husband and wife who are separated. They were co-partners in a retail dress business located at 7314 Fifth Avenue, Brooklyn, New York which they conducted under the trade name of the Jercyn Dress Shop. On October 19, 1972 an assignment for the benefit of creditors was made by "JERCYN DRESS SHOP, a co-partnership comprised of JACK A. SCHERER and EVA SCHERER" to Bernard Sands which was signed and acknowledged by the Scherers as co-partners. The deed of assignment was then filed in the office of the County Clerk of Kings County.

On November 15, 1972 an Involuntary petition in bankruptcy was filed in this Court by three creditors of the partnership against "JERCYN DRESS SHOP, A Partnership, and

REFEREE'S OPINION DATED APRIL 3, 1973

JACK A. SCHERER, and EVA SCHERER, as General Partners, Jointly". The petition alleges one Act of Bankruptcy which reads as follows:

"4. Within four months next preceeding the filing of this petition, the Alleged Bankrupts did heretofore, to wit, on or about October 20, 1972, make an assignment for the benefit of creditors to Bernard Sands, which assignment was recorded in the office of the Clerk of the County of Kings, State of New York, on October 20, 1972."

On December 13, 1973, "JERCYN DRESS SHOP, a partnership, (But not JACK A. SCHERER and EVA SCHERER individually and as co-partners)" appeared and consented to adjudication. On the same day the Scherers appeared and interposed their answer, as individuals, in which they denied the 4th allegation of the petition in bankruptcy. They alleged, as an affirmative defense, that only the partnership had made the assignment for the benefit of creditors and that they, as individuals, had committed no act of bankruptcy which would

REFEREE'S OPINION DATED APRIL 3, 1973

subject them to adjudication. They had served their motion to dismiss the petition on the attorneys for the petitioning creditors on December 5, 1972.

The motion to dismiss was argued before me on January 30, 1973 and the parties were given until February 26, 1973 to serve and file Memoranda of Law.

The Scherers contend that Section 5 of the Bankruptcy Act, 11 U.S.C. Section 23, provides, in subdivisions a and b, that a partnership as an entity may be adjudicated a bankrupt independent of the bankruptcy of its individual partners. These subdivisions provide as follows:

"a. A partnership, including a limited partnership containing one or more general partners, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudicated a bankrupt either separately or jointly with one or more or all of its general partners.

b. A petition may be filed by one or more or all of the general partners in the separate behalf of a partnership or jointly in behalf of a

REFEREE'S OPINION DATED APRIL 3, 1973

partnership and of the general partner or partners filing same: Provided, however, (emphasis in original) that where a petition is filed on behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent. A petition may be filed separately against a partnership or jointly against a partnership and one or more of its general partners. (Emphasis supplied except where indicated.)

It is their position that they were very careful to execute the assignment for the benefit of creditors only on behalf of the partnership as an entity so that it, and not they as individuals, committed the Act of Bankruptcy required by Section 3a(4) of the Bankruptcy Act, 11 U.S.C. Section 21a(4). They point out that the partnership has consented to adjudication and they ask that the petition, so far as it seeks their individual adjudications, be dismissed.

The petitioning creditors contend that due to the peculiar nature of partnership law the execution of an assignment for the benefit of creditors by the partners "Is considered to be,

REFEREE'S OPINION DATED APRIL 3, 1973

in law, an act of both the partnership and the individual or individuals who executed same" (Petitioning Creditor's Memorandum of Law, p. 13, emphasis added). They point out that Section 26 of the Partnership Law of the State of New York provides that partners are jointly liable for all debts and obligations of the partnership and that Section 20, subdivision 3(a) thereof provides that all the partners of a partnership must authorize the execution of an assignment for the benefit of creditors by it.

The petitioning creditors cite the case of Chemical National Bank v. Meyer, 92 F. 896, Aff'd. 98 F. 976 as authority for their position. In that case, decided in 1899, the Court held that a partnership could not be adjudged a bankrupt without at least one of the partners being adjudicated for it was the purpose of the Bankruptcy Act "not only to distribute the property, but to relieve the debtor." (p. 899) It then went on to say, "While the discharge of an individual debtor would

REFEREE'S OPINION DATED APRIL 3, 1973

discharge him from all his property, (sic) the discharge of a partner, as such, from partnership debts, so far as the partnership property was concerned, would leave him still liable to the full extent of his individual property, subject to his individual debts, for whatever might remain unpaid of a partnership obligation. Therefore, the mere administration of partnership property will furnish no personal relief whatever to the debtor, and the grand purpose, which is commonly proclaimed to be the spirit and to lie at the foundation of the act, viz. to relieve the debtor class from the burden of obligations impossible for them to discharge, would be unfulfilled."

The Court, in that case, was concerned with the over-all purpose of the Bankruptcy Act which was to give a debtor complete relief from all his debts, individual and partnership. However it realized that the new Bankruptcy Act (it had gone into effect in 1898, only a year before) introduced the Entity Doctrine for partnerships for the first time in the history of Bankruptcy

REFEREE'S OPINION DATED APRIL 3, 1973

Legislation for it said, at page 899:

"Yet let it be repeated that the plain reading of the statute is that, for the purposes of the Act, partnerships are 'persons' and that partnerships may be adjudicated bankrupt. This seems to illustrate that Congress has endowed a partnership with something of the nature of a separate distinct entity, while in the reason of the thing, in view of a knowledge of what a partnership is, it seems neither practical to give a partnership such personality, nor to administer its affairs without a contemporaneous administration of the estate of at least one of the partners. However, if the statute is to be literally construed, such a contention is defensible, and the decision is to rest upon the words of the statute, whatever other result might be attained by a consideration of the essential principles of law relating to partnerships. The plain language of the statute was against its acknowledged object, to discharge debtors, as well as the essential nature of a partnership."
(Emphasis mine)

The Court held that in spite of the language of the statute, both the partnership and the individual partner who executed the assignment for the benefit of creditors should be adjudicated bankrupts.

REFEREE'S OPINION DATED APRIL 3, 1973

The Scherers, on the other hand, cite the case of Liberty National Bank v. Bear 276 U.S. 215 decided by the United States Supreme Court in 1928, twenty-nine years after the Meyer case supra, in which the Court held that a partnership could be adjudicated bankrupt as an entity without adjudicating the individual partners. Mr. Justice Sanford, speaking for the Court, said the following, at page 220:

"This contention that a petition in bankruptcy filed against a partnership alone was also a petition against the individual partners as well disregards entirely the principle established by the Bankruptcy Act that a partnership may be adjudicated a bankrupt as a separate entity without reference to the bankruptcy of the partners as individuals. In this respect the Act makes a complete change from the earlier Bankrupt Law of 1867, which did not permit the partnership entity to be adjudged a bankrupt, but merely provided that when two or more persons who were partners in trade were adjudicated bankrupt, the property of the partnership, as well as that of the partners, should be taken over by the Bankruptcy Court for administration. The present Act of 1898 not only omits this provision of law of 1867, but-after providing generally that the

REFeree's OPINION DATED APRIL 3, 1973

word 'persons' when used in the Act shall include 'partnerships', Section 1 (19), and that a petition in bankruptcy may be filed against a 'person' who is insolvent and has committed an act of bankruptcy, Section 3(B) - specifically declares in Section 5 a that:

'A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Under this provision, as was said in Meek v. Centre County Banking Co., 268 U.S. 426, 431, there 'can be no doubt that a partnership may be adjudged a bankrupt as a distinct legal entity.' And if proceeded against as a distinct legal entity, without reference to the individual partners, it may, as such, under Section 21A, offer terms of composition to the partnership creditors alone. Meyers v. Internat. Trust Co., 273 U.S. 380, 383:

"It has long been the established rule in the Circuit Courts of Appeal and District Courts that under Section 5 of the Act a partnership may be adjudged a bankrupt as a separate entity, under a voluntary or involuntary petition, irrespective of any adjudication of bankruptcy against the individual partners" (Matter in brackets and emphasis added).

Following the quotation set forth above, the Court cited a long list of cases in various Circuits and Districts as authority for the

REFEREE'S OPINION DATED APRIL 3, 1973

principle enunciated therein. This list included the case of Chemical Bank v. Meyer Supra, cited by the petitioning creditors.

The Bankruptcy Act of 1898 was superceded by the Chandler Act in 1938 which contains substantially the same provisions, as to partnerships, as did its predecessor. These have been referred to as Sections 5 a and b, 11 U.S.C. Section 53 a and b, and have been quoted at page 3 of this opinion.

In the case at bar, the assignment for the benefit of creditors relied on by the petitioning creditors as an act of bankruptcy was executed by the partnership, Jercyn Dress Shop, as an entity and not by the Scherers as individuals. This partnership act could not be imputed ipso facto to them and thus be used as an act of bankruptcy against them. To accept the contention of the petitioning creditors would mean that the partnership entity could never be separated from the individual partners in bankruptcy proceedings since the partnership could

REFEREE'S OPINION DATED APRIL 3, 1973

only commit an act of bankruptcy through one of its partners. This flies in the face of the clear language of Section 5 a and b of the Bankruptcy Act, 11 U.S.C. Sections 23 a and b, which specifically provide for the adjudication of the partnership alone, independent of the adjudication of any partner. Of course, this does not mean that partnership creditors are stayed or restrained from proceeding to collect their debts from the individual partners since Section 5 J of the Bankruptcy Act, 11 U.S.C. 23 J, provides that "the discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts."

The motion of Jack A. and Eva Scherer to dismiss the involuntary petition in bankruptcy filed against them is granted.

Settle order on notice within ten (10) days.

Dated: Brooklyn, New York
April 3, 1973

Manuel J. Price
Referee in Bankruptcy

ORDER DISMISSING THE INVOLUNTARY PETITION IN
BANKRUPTCY TO THE EXTENT THAT IT IS ADDRESSED
AGAINST JACK A. SCHERER AND EVA SCHERER, INDIVIDUALLY
AND AS GENERAL PARTNERS OF THE PARTNERSHIP OF
JERCYN DRESS SHOP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

In the Matter of

No. 72B1151

JERCYN DRESS SHOP, a Partnership and
JACK A. SCHERER and EVA SCHERER,
as general partners, jointly,

CROSS ORDER

Alleged Bankrupts.

-----x

At Brooklyn, New York, in said District, on the 5th
day of April, 1973.

Upon the application and notice of motion of JACK A.
SCHERER and EVA SCHERER, alleged bankrupt dated
December 5th, 1972 for an order, as a matter of law, dismissing
the involuntary petition in bankruptcy, to the extent that the said
involuntary petition was addressed against said JACK A. SCHERER
and EVA SCHERER, individually and as general partners of

ORDER DISMISSING THE INVOLUNTARY PETITION IN
BANKRUPTCY TO THE EXTENT THAT IT IS ADDRESSED
AGAINST JACK A. SCHERER AND EVA SCHERER, INDIVIDUALLY
AND AS GENERAL PARTNERS OF THE PARTNERSHIP OF
JERCYN DRESS SHOP

JERCYN DRESS SHOP, which said partnership had heretofore filed its consent to adjudication herein; the assignment for the benefit of creditors, dated October 19th, 1972, executed and filed by Jercyn Dress Shop in the Kings County Clerk's office; the involuntary petition in bankruptcy herein, dated November 15th, 1972; the answer of JACK A. SCHERER and EVA SCHERER, alleged bankrupts dated December 6th, 1972, and upon all the other papers and proceedings heretofore had herein; and the said application having duly come on before the undersigned Referee on January 30th, 1973; and after hearing HAUPTMAN & HAUPTMAN, ESQS., and NATHAN B. FOGELSON, ESQ., by S.A. HAUPTMAN, ESQ. of counsel, attorneys for the alleged bankrupts, in support thereof, and ROBERT P. HERZOG, ESQ. and ROBERT M. FISHER, ESQ. by ROBERT P. HERZOG, ESQ. of counsel, attorneys for the petitioning creditors, in opposition thereto, and due deliberation

ORDER DISMISSING THE INVOLUNTARY PETITION IN
BANKRUPTCY TO THE EXTENT THAT IT IS ADDRESSED
AGAINST JACK A. SCHERER AND EVA SCHERER, INDIVIDUALLY
AND AS GENERAL PARTNERS OF THE PARTNERSHIP OF
JERCYN DRESS SHOP

having been had thereon, and the Court having rendered its opinion
now on file herein;

NOW, on motion of ROBERT P. HERZOG, ESQ. and
ROBERT M. FISHER, ESQ., attorneys for the petitioning
creditors, it is

ORDERED, that the motion of JACK A. SCHERER and
EVA SCHERER, alleged bankrupts herein to dismiss the involun-
tary petition in bankruptcy, to the extent that it is addressed
against them individually and general partners of the partnership
of JERCYN DRESS SHOP be and the same hereby is granted;
and it is further

ORDERED, that the petitioning creditors be and they
hereby are granted leave to amend the said involuntary petition,
dated November 15th, 1972 within ten days after notice of entry
of this order; and it is further

ORDER DISMISSING THE INVOLUNTARY PETITION IN
BANKRUPTCY TO THE EXTENT THAT IT IS ADDRESSED
AGAINST JACK A. SCHERER AND EVA SCHERER, INDIVIDUALLY
AND AS GENERAL PARTNERS OF THE PARTNERSHIP OF
JERCYN DRESS SHOP

ORDERED, that JERCYN DRESS SHOP, a partnership
having filed its written consent to be adjudicated a bankrupt with
this Court, dated December 6th, 1972 be and it hereby is adjudged
a bankrupt under the Act of Congress, relating to bankruptcy; and
it is further

ORDERED, that JACK A. SCHERER and EVA SCHERER,
general partners be and they hereby are directed, pursuant to
Section 7 of the said Act, to file with this Court within five days
from the date of the entry of this order all Schedules and Statement
of Affairs of Jercyn Dress Shop, a bankrupt, in triplicate, and
they be and they hereby are directed to henceforth attend before
the undersigned Referee and to submit to such orders as may be
made by him or by a Judge of this Court relating to said bankruptcy.

s/ Manuel J. Price
REFEREE IN BANKRUPTCY

PETITION TO REVIEW ORDER DATED APRIL 5, 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In the Matter of

No. 72B1151

JERCYN DRESS SHOP, a partnership and
Jack A. Scherer and Eva Scherer, as
general partners, jointly

PETITION
TO REVIEW

Alleged Bankrupts.

-----X

TO THE HONORABLE UNITED STATES DISTRICT JUDGES
FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of LESLIE FAY SALES, a Division of
LESLIE FAY, INC., FALCHICK DRESS CO. INC., and CAMPUS
JUNIORS, INC. by their attorney, respectfully shows and alleges:

1. Petitioners are aggrieved by the decision of HON.
MANUEL J. PRICE, Referee in Bankruptcy, dated April 3rd,
1973, a copy of which is annexed hereto as Exhibit "A", and that
portion of the order made thereon, dated April 5th, 1973 that
dismisses the involuntary petition in bankruptcy to the extent

PETITION TO REVIEW ORDER DATED APRIL 5, 1973

that it is addressed against Jack A. Scherer and Eva Scherer, individually and as general partners of the partnership of JERCYN DRESS SHOP, a copy of which order is annexed hereto as Exhibit "B".

2. The said Referee's decision and that portion of the order made thereon is erroneous as a matter of law.

WHEREFORE your petitioners pray that the said order be reviewed by a Judge in accordance with the provisions of the Bankruptcy Act, and that a portion of the said order be reversed, and that your petitioners have such other and further relief as is just.

Dated: New York, New York,
April 12th, 1973.

LESLIE FAY SALES, a Division of
LESLIE FAY, INC.
FALCHICK DRESS CO. INC.
CAMPUS JUNIORS, INC.

BY _____

ROBERT P. HERZOG, Co-attorney for
Petitioning Creditors

TO: HON. MANUEL J. PRICE

Referee in Bankruptcy
225 Cadman Plaza East,
Brooklyn, New York

HAUPTMAN & HAUPTMAN, ESQ'S.
32 Court Street
Brooklyn, New York

NATHAN B. FOGELSON, ESQ.
7 Dey Street
New York, New York 10007

PETITION TO REVIEW ORDER DATED APRIL 5, 1973

EXHIBIT "A"--

REFEREE'S OPINION

SEE: REFEREE'S OPINION DATED APRIL 3, 1973
pages 64-75

PETITION TO REVIEW ORDER DATED APRIL 5, 1973

EXHIBIT "B" -

CROSS ORDER

SEE: ORDER DISMISSING THE INVOLUNTARY PETITION IN
BANKRUPTCY TO THE EXTENT THAT IT IS ADDRESSED
AGAINST JACK A. SCHERER AND EVA SCHERER, INDIVIDUALLY
AND AS GENERAL PARTNERS OF THE PARTNERSHIP OF
JERCYN DRESS SHOP

pages 76-79

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

In the Matter	:	72 B 1151
of	:	
JERCYN DRESS SHOP	:	MEMORANDUM
a partnership,	:	OF
	:	<u>DECISION</u>
Bankrupt.	:	

-----x

APPEARANCES:

ROBERT P. HERZOG, ESQ.
Attorney for Petitioning
Creditors-Appellants

HAUPTMAN & HAUPTMAN, ESQS.
Attorneys for Alleged
Bankrupts-Appellees
By NATHAN B. FOGELSON, ESQ.

NEAHER, District Judge.

This petition to review an order of the bankruptcy judge
presents but a single question of law: When partners of a

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

partnership make and sign a general assignment for the benefit of creditors of the partnership assets only, such that the partnership is found to have committed an act of bankruptcy, has each of the assigning partners thereby also committed an individual act of bankruptcy? The court's conclusion, for the reasons set forth below, is that such an assignment is not automatically or necessarily an individual act of bankruptcy by the co-assignors.

The facts may be briefly summarized. On October 19, 1972, Jack A. and Eva Scherer executed and signed, as co-partners of Jercyn Dress Shop ("Jercyn"), a general assignment for the benefit of creditors which assigned the partnership assets only to Bernard Sands as assignee for Jercyn's creditors.¹ On November 15, 1973, three of those creditors filed an involuntary petition in bankruptcy against Jercyn and against "JACK A. SCHERER and EVA SCHERER, as general partners, jointly."² Thereafter Jercyn consented to its adjudication, but the Scherers moved for dismissal of the

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

petition as against them individually and as general partners. The bankruptcy judge, resolving the question presented here in the negative, granted the motion in an opinion dated April 5, 1973, and the matter is before the court solely on the question of law presented.

The judge's opinion deals at length with what the court views as the applicable law. The earliest case of relevance is In re Meyer, 98 F. 976 (2 Cir. 1899), aff'g Chemical Nat. Bank v. Meyer, 92 F. 896 (E.D.N.Y.). In that case a general assignment of partnership property was executed by one of two surviving partners, Meyer. The district court concluded, inter alia, that Meyer had thereby committed an act of bankruptcy individually, 92 F. at 901, and the Second Circuit agreed. 98 F. at 980. The case was decided under the then-recent Bankruptcy Act of 1898, and, as later interpreted, Meyer recognized that under §5(a) of the Bankruptcy Act, 11 U.S.C. § 23(a):

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

a partnership may be adjudged a bankrupt as a separate entity, under a voluntary or involuntary petition, irrespective of any adjudication of bankruptcy against the individual partners. Liberty National Bank v. Bear, 275 U.S. 215, 222 (1928) (citing Meyer).³

The same result was later obtained in In re Grant, 105 F. 496 (S.D.N.Y. 1901), where a general assignment for the benefit of creditors was executed by two of the three partners, and each was thereby found to have committed an act of bankruptcy. 106 F. at 497. In Green River Deposit Bank v. Craig, 110 F. 137 (W.D. Ky. 1901), an assignment was made, by the two partners of a partnership, of both partnership and individual property. In finding acts of bankruptcy committed by both the partnership and the individual partners, the court, citing Meyer and Grant, stated:

The proper rule seems to be that, where both the partnership and each of the individuals who compose it make the assignment, the act of bankruptcy is committed by all of them. The adjudication should therefore embrace both the firm and the individual members.
110 F. at 140.

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

Subsequently, the Supreme Court in Liberty made it clear that §5(a) of the Bankruptcy Act permitted a partnership to be adjudged a bankrupt alone, it not being "essential to such an adjudication that the partners should also be adjudged bankrupt individually." 276 U.S. at 224-25 (emphasis added). However, if joint adjudication of partnership and partner is not essential, it does not follow that it is somehow impermissible. In fact, the Court's own citation to such joint adjudication belies that contention, *id.* at 222-23, and the present statute, see note 3 supra, plainly contemplates joint adjudication.

Liberty also makes clear that the acts of partners may be judged on an individual basis, apart from an involuntary petition which seeks not an adjudication against them as individuals, but only one against the partnership, and that a partner does not necessarily commit an individual act of bankruptcy when the partnership does. 276 U.S. at 223. Liberty thus ensured that

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

the metamorphosis of the common law concept of partnership in the bankruptcy law was complete. Meyer went halfway by recognizing, only a year after major changes in the law by the Bankruptcy Act of 1898, that it was not necessary to adjudicate all or any of the partners to adjudicate the partnership. Liberty completes the circle by distinguishing between individual and partnership acts by a partner. While logically, as the Meyer case notes, a partner's act concerning partnership property ultimately affects his individual assets, 92 F. at 900, after Liberty, such an act, without more, must be viewed as only a partnership act, not an individual act. Any suggestion to the contrary by Meyer is highly questionable in view of the distinction drawn between them in Liberty. Thus, even though the Court in Liberty did not rule on the exact question presented here,⁴ we agree with one noted authority that

"(t)here can be no serious question but that,
to throw an individual partner into bankruptcy,

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

as contrasted with accomplishing this result as to the firm, a partnership act of bankruptcy will not suffice; the act must be his individual act as well or he must have committed some other individual act of bankruptcy."

1 H. Remington on Bankruptcy § 86 at 154 (1950) (footnote omitted).

In this case, the bankruptcy judge properly stressed the fact that the assignment was made by the partnership as an entity and not by the Scherers as individuals.⁵ Moreover, only partnership property was affected. There is no suggestion of a general assignment by an individual partner of his own assets, an individual act of bankruptcy for which joint adjudication with the present partnership act of bankruptcy would be contemplated.

Accordingly, there appearing to be no error of law in the bankruptcy judge's order granting the motion to dismiss the involuntary petition as to the individuals Jack A. Scherer and Eva Scherer, it must be, and hereby is, affirmed.

So ordered.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, N. Y.
August 14, 1974

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

F O O T N O T E S

¹ While the copy of the agreement before the court is unsigned, it was agreed at the hearing below that the original on file in the County Clerk's office was made and signed by both partners. Transcript of Motion Hearing, January 30, 1973, at pp. 3-4.

² Involuntary Petition of Creditors Leslie Fay Sales, a Division of Leslie Fay, Inc.; Falchick Dress Co., Inc.; and Campus Juniors, Inc.

The petition was grounded solely in § 3(a) (4) of the Bankruptcy Act, 11 U.S.C. § 21(a) (4):

"(a) Acts of bankruptcy by a person shall consist of his having . . . (4) made a general assignment for the benefit of his creditors . . . "

Appellees do not appear to renew here their contention raised below that the petition fails to allege that an act of bankruptcy was committed by the individual alleged bankrupts in their individual capacity. The court will assume for purposes of this appeal that the petition is not deficient in this technical requirement.

³ Section 5 now provides, where pertinent:

"(a) A partnership . . . during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be

DECISION AND ORDER OF HON. EDWARD R. NEAHER, UNITED
STATES DISTRICT JUDGE, DATED AUGUST 14, 1974

adjudged a bankrupt either separately or jointly with one or more or all of its general partners.

"(b) ... A petition may be filed separately against a partnership or jointly against a partnership and one or more or all of its general partners."

⁴ The actual holding in Liberty was that an involuntary petition which did not in terms seek an adjudication that the partners

were bankrupt as individuals, nor allege that as individuals they were insolvent or had committed any acts of bankruptcy, was not in legal effect a petition filed against them individually, and the adjudication under that petition that the partnership was a bankrupt, was not in legal effect an adjudication that they were bankrupts individually. 276 U.S. at 226.

⁵ Although this distinction is not sharply drawn in the involuntary petition, see note 2 and accompanying text, supra, an examination of the assignment itself reveals that it plainly assigns partnership assets only, and is signed by the co-partners acting in a representative capacity for the partnership.

7/27/74.
2:45 PM,

Copy Received

Letter from [unclear]
for National Forum

Copy Received

SEP 27 1974

HAUPTMAN & HAUPTMAN
N. H. Hauptman
ATTORNEYS

32 COURT STREET

BROOKLYN 1, N. Y.

ORIGINAL